United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6130

In The

United States Court of Appeals

For The Second Circuit

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

- against -

CANADIAN JAVELIN LIMITED,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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3. The Court below abused its discretion by ordering Javelin to retain Meyer Eisenberg, an American attorney, to act as its counsel in an action pending against Javelin in a Canadian court.

STATEMENT OF THE CASE

On July 19, 1974, a consent decree was entered in the United States District Court for the Southern District of New York which resolved the then pending litigation between the Securities and Exchange Commission ("SEC") and Canadian Javelin Limited ("Javelin"). Under the terms thereof, relevant to this appeal, Javelin agreed to establish a "compliance committee", a majority of whose members would consist of "independent Board members" (A-38) and to appoint independent outside counsel "special counsel" (satisfactory to the SEC) to the committee (A-39). Pursuant to the terms of the decree, special counsel is to "review the dissemination of all information to the public by Javelin or any of its subsidiaries..." (A-39) and is "to take all reasonable steps to secure Javelin's compliance with the U. S. Securities Laws...." (A-39). The decree mandates that in the event of Javelin's non-compliance, special counsel should notify both the SEC and the Javelin Board, and advise Javelin's Board as to the steps necessary to cure the default (A-39). Other than the carrying out of the functions assigned by the judgment, the decree forbids special counsel to have any business or professional relationship with Javelin (A-39).

The consent decree requires also that Javelin take steps to cause its Board (shareholder elected) to be forty percent made up of independent outside Directors, each of whom met the

criteria specified in the decree and to the satisfaction of the SEC (A-37, 38). Javelin did in fact take steps resulting in the election of independent directors approved by the SEC (including Mr. Harold H. M. Smith ("Smith"); and with the approval of the SEC appointed Meyer Eisenberg as special counsel. Eisenberg, a Washington, D. C. lawyer, had been on the staff of the SEC for a number of years and was wholly satisfactory to the SEC.

Smith, after seeking company action without success, commenced action in the Supreme Court of Ontario, as a shareholder and a Director of Javelin. The action named Javelin, the U. S., Securities and Exchange Commission and Eisenberg as defendants. The gravamen of his action is that Javelin is a Canadian (Dominion) corporation subject to Canadian corporate law; and that Section IV of the consent decree - the relevant portion set out above - is ultra vires the power of the Board of Directors to consent to and assume as it effectually provides for an abdication and delegation of rights, powers and duties of Javelin's Board, and Shareholders to the compliance committee, and (especially) to Eisenberg as special counsel appointed under the decree. Smith also contends that to the extent permissible under Canadian Law, approval of the consent decree, and acceptance by the corporation of its terms has not been had of the shareholders to the extent, and in the manner secured under Canadian Corporate Law. Smith seeks judicial declaration by the Ontario Supreme Court that the resolution

approving the consent decree was illegal, null and void and not binding on Javelin; and that the appointment of Eisenberg as special counsel, and of the compliance committee are illegal, void and ultra vires (A-20 et. seq).

The SEC then applied to Judge MacMahon, the District Judge who entered the consent decree for an order to show cause why Javelin should not be required to appoint Eisenberg as its attorney for the purpose of defending against Smith's Ontario Court action (A-4). The entire application was brought on before Judge MacMahon on less than two days' notice (service of papers was made on Javelin's New York counsel (A-4) and was summarily disposed of from the bench. Javelin request for a hearing on the motion was summarily denied. On the same day (December 19, 1975), Judge MacMahon entered an order directing Javelin to appoint Eisenberg to act on behalf of Javelin in the Ontario suit, and authorizing Eisenberg to retain Canadian counsel qualified to represent Javelin in the suit and to protect the subject matter of the "instant case". The order further directed Javelin to pay the fees and expenses of Eisenberg and the counsel selected by him in connection with such "defense" (A-64).

It was shown below that Javelin had itself declined to attack the decree and had no intention of attacking the decree (A-53, 56); that Eisenberg was not qualified to represent Javelin in Canada (A-54,55); for he was neither qualified or admitted to

the practice of law there; that both Eisenberg and the SEC were named parties in the Ontario action and thus certainly Eisenberg had full opportunity to act, present evidence, and defend the judgment fully in the Smith action; that indeed the appointment of Eisenberg reinforced Smith's argument that Javelin's Board of Directors were being ousted from their plain duty by the decree (A-29,30).

SUMMARY OF ARGUMENT

The District Court by its order of December 19th has in effect taken over management of the defense of the Canadian law suit from Javelin. It has done so without a hearing, although a hearing was requested, and without due process of law. There was no showing that Javelin would not properly defend the Canadian action and there was no justification for the harsh equitable remedy imposed, particularly where Javelin had fully complied with the consent decree in the past, and proffered every intention of complying in the future. Furthermore, there were adequate other remedies if Javelin subsequently failed to comply.

While the court may have been entitled to inquire as to whether its decree would be protected, it had no authority to require Javelin to appoint any particular counsel for that purpose. The defense of the Canadian action and the choice of counsel for that defense are matters which Javelin is legally and constitutionally entitled to determine for itself. Not only has the District Court deprived Javelin of these opportunities, but it has delegated responsibility to Meyer Eisenberg, a co-defendant in the Canadian action with a rather obvious conflict of interest.

Eisenberg is the worst possible choice of persons to be placed in control of Javelin's defense. The District Court clearly abused its discretion in so selecting him. Not only does

he have a financial interest in the outcome of the Canadian litigation, but his interpretation of the consent decree, giving him the right to prior censorship, might be precisely the interpretation most harmful to the decree in the Canadian courts. Javelin must instead be permitted to work out its own peace with the Canadian as well as with the American authorities.

Just as Eisenberg is unsuitable in his appointed role, any attorney selected by him in Canada will be unable to serve two clients in this case. No Canadian attorney can sufficiently represent Javelin when he must first answer to Eisenberg.

The District Court held no hearing on the issue on whether the decree needed protection and held no hearing on Eisenberg's qualification or desirability for that purpose. The order appealed from was granted without due process, on two days' notice to Javelin's counsel in New York. For all of the foregoing reasons, it must be reversed.

Argument

POINT I

THE COURT BELOW HAD NO AUTHORITY TO ORDER JAVELIN TO APPOINT EISENBERG TO DEFEND AN ACTION PENDING IN A CANADIAN COURT.

(A) The order appealed from is an improper delegation of corporate and judicial power.

In essence Judge MacMahon directs Javelin to appoint Eisenberg as a conductor of the action on its behalf in the court in Ontario. In so doing, the court below improperly delegates unto Eisenberg both the corporation's powers and those of the court. In the guise of protecting the decree, Judge MacMahon's order deprives Javelin of the right and opportunity to conduct its own defense. Evidence, argument, and the conduct of a cause involve serious decisions on the part of a litigant and his counsel. Positions asserted, stipulations made and evidence adduced by a litigant seriously affect the affairs and business of the litigant; oft times not only in respect of the ongoing litigation but also, to the distant future. No court has a right to take from a litigant the right to control its affairs.

There are of course cases in Equity in which the court orders a person before it to do a certain thing, even to make a certain defense in an action. Whatever the relevance of such cases, the court here has far exceeded that type of action. Not

only has the court seized control of the defense of the action, it has delegated that control to Eisenberg without any instructions to Eisenberg except that he protect the subject matter. Eisenberg, the court recognizes, is unable (indeed unqualified to act in Canada) and therefore the court seeking to solve that problem delegated to Eisenberg the right to retain a lawyer in Canada. As an end result, the lawyer for Javelin in Canada, is neither under the control of Javelin, his supposed client, nor under direction of the court which ordered his appointment.

In sum, the lawyer for Javelin thus is under the control and direction of Eisenberg. Eisenberg, if the order is permitted to stand, will make the decisions as to what tack Javelin's defense should take. There are at least several objectionable feautures. First off, Eisenberg is in a conflict position with Javelin since a significant portion of Smith's argument is directed not against the decree per se but rather against Eisenberg's implementation thereof and the manner and expense in which he, as special counsel, has carried out his function. That to one side, Javelin had already retained counsel to defend its position (A-58), and Eisenberg's retention of special counsel results in confusion (inherent when two sets of counsel, each taking different positions, represent a single client); of that more later. What is more objectionable is that the court gave Eisenberg carte blanche to determine what action he should take in the Smith case. Assuming

that the court could fashion a proper position to be advanced, and the court could require a litigant to take that position, and that the court could delegate to a particular person the right to take that position, that is not what Judge MacMahon did. He simply told Javelin to turn over to Eisenberg its defense and that Eisenberg should "protect the subject matter". An impermissible delegation of judicial power is plain.

(B) The court order appointing Eisenberg without full hearing constitutes deprivation of Due Process.

As noted already the court below moved to the extraordinary remedy it fashioned without full and fair hearing; and on a motion to show cause entered long after judgment under the guise that it was necessary to protect the court's decree. But the court did not enter a temporary or interlocutory order - indeed since Eisenberg was already a party and could protect "the subject matter" sua sponte no emergency relief was ever indicated. Yet without fair opportunity for hearing, or even the semblance of a hearing, the court announced from the bench that he was granting the order. The order of the court was in the nature a judgment. Its entry without hearing when timely requested by Javelin violated the due process requirement of the Fifth Amendment. Compare SOCIETE INTERNATIONALE v. ROGERS 357, U.S. 197, 210-212 (1958), McFARLAND v. GREGORY, 425 F. 2d 443, 449-50 (1970), Rules 14, 15 Civil Rules of the U.S.D.C., S.D. N.Y.

POINT II

THE COURT BELOW HAD NO AUTHORITY TO SELECT COUNSEL TO DEFEND JAVELIN, A CANADIAN CORPORATION, IN AN ACTION PENDING AGAINST IT IN A CANADIAN COURT.

The District Court, by selecting counsel to represent Javelin in the Canadian action, has substituted its judgment for that of Appellant, Javelin. In so doing, it has deprived Javelin of the right to select its own counsel and to control its defense. It is axiom that the right to be represented by counsel includes the right to choose one's one counsel. REICKAUER v. CUNNINGHAM, 299 F. 2d, 170 (4 Cir. 1961). "The trial court cannot substitute its judgment for that of litigant in the choice or number of counsel that the litigant may feel is required to properly represent his interests." SANDERS v. RUSSELL, 401 F. 2d, 241, 246 (5 Cir. 1968).

Not only has the District Court seized control of the defense of the Canadian action, but it has delegated that control to Eisenberg, by empowering him to select Canadian counsel on behalf of Javelin.

Assumming an inherent power in the court below to protect its decree, the court only became entitled to inquire as to whether exercise of that power was required in the existing situation. As Eisenberg was named a defendant in the Smith suit, as

was the SEC, it is clear that Eisenberg could assert the same position on his own behalf that he would be expected to assert on behalf of Javelin. The SEC, likewise, was afforded an opportunity to appear and assert its position before the Canadian courts. Thus, with both those defendants fully possessed of the opportunity to be heard, there can be no doubt that the Ontario court could receive full measure of their respective views on the decree. Under these circumstances, it was surplusage to require that Javelin appoint as counsel the same Eisenberg, in the Ontario action, to assert the identical position on behalf of Javelin. The District Court order thus effected only duplication of effort and deprivation of Javelin's rights.

The fact that Javelin was not accorded a hearing on these questions in the court below constituted unconstitutional deprivation of Javelin's right to counsel. Javelin was deprived of its own voice and rendered incapable, as a Canadian corporation, of appearing before a Canadian court with lawyers of its own choosing. It is caught in the cross-fire of seeking to comply,* with the consent decree, and of seeking to comply, (as it rather must), with Canadian law, yet being prevented from acting freely through its own counsel to walk a course of its own choice.

The appointment of Eisenberg, without express direction of the positions and arguments to be taken and made in the Canadian

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*There is no denial in the record of Javelin's claim of compliance and continued intention to comply with the decree.

court has already been shown to constitute inpermissible delegation of judical power (see Point I). Going further, however, the court erred in making the appointment without express inquiry, determination and decision of the merits of Smith's contentions. That is not to say the U. S. Court should seek to determine the merits of the Smith case, but rather than the court, before entering upon, and turning over to another (especially one who has his own row to hoe) must determine whether or not the direction to oppose plaintiff in the foreign court is prima facie justified, particularly as to what issues the court directs its appointee to contest and what precise defenses, contentions and positions the appointee should take. Such direction by the court is required bedrock for the appointment.

POINT III

THE COURT BELOW ABUSED ITS DISCRETION BY ORDERING JAVELIN TO RETAIN MEYER EISENBERG, AN AMERICAN ATTORNEY, TO ACT AS ITS COUNSEL IN AN ACTION PENDING AGAINST JAVELIN IN A CANADIAN COURT.

The District Court has placed Eisenberg in control of Javelin's defense in the Canadian action. Eisenberg is a co-defendant in that action. Eisenberg may be expected to argue that Javelin's compliance with the consent decree is the result of his (Eisenberg's) efforts and interpretation of the terms of the decree. E.G., that Eisenberg's prior censorship of releases and filings is fair interpretation of the decree. In other respects, he may adopt interpretations of the wording of the decree contended for by the SEC. Such interpretations may or may not be interpretations which Judge MacMahon himself might make, should the issue in each instance be placed before him; and may, in the view of Javelin, precisely support the Smith argument that the Javelin Board has abdicated and delegated its non-delegable powers.

Javelin may be placed in the untenable position of complying either with Canadian law or with the consent decree, but not both. Avoidance of this result is essential to the company. The efforts of the company to prevent such a dilemma should not be fettered by the appointment of a defender who has an interested position - a personal financial interest in the outcome

of the litigation - apart from the sheer upholding of the decree. When there exists a conflict, the management of Javelin's defense should never be relegated to one having such an obvious and independent conflict of interest.

The District Court recognized Eisenberg's inability to practice law in Canada by permitting him to appoint Canadian counsel to represent himself and Javelin. To the extent that Eisenberg selects and controls the Canadian counsel, he places that counsel too in a position of conflicting interest. Canadian counsel cannot adequately represent Javelin when it must answer to Eisenberg. "An attorney owes to his client an undivided allegiance, and after he has been retained by, and received the confidence of, a client, he cannot, without the free and intelligent consent of his client, given after full knowledge of all the facts and circumstances, act both for his client and for one whose interest is adverse to or conflicting with that of his client in the same general matter. It makes no difference how slight the adverse interest may be. And the fact that the motive and intention of the attorney are honest is immaterial." 7 AM. JUR. 2d Atty's at Law. Sec. 154.

It is only reasonable to believe that the position taken by counsel selected for Javelin by Eisenberg will be Eisenberg's position, not Javelin's. While it cannot be said that Javelin's position is in any sense antagonistic to the con-

sent decree, Javelin is being denied the opportunity to achieve a workable relationship with the Canadian authorities as well as the American authorities, if in fact any portions or interpretations of the consent decree violate Canadian law. Eisenberg and his nominee, in promoting their own points of views and objectives, may very well create further conflicts and place additional burdens upon Javelin in Javelin's efforts to meet the requirements of both jurisdictions. The court below has done nothing to prevent Eisenberg from adopting positions that cause great mischief to Javelin, but has instead delegated full control of Javelin's defense to Eisenberg, without guidance and without supervision. Under such circumstances, it may well be that the appointment of Eisenberg's nominee as Javelin's counsel would bring about a situation in which Javelin finds itself having difficulties under Canadian law as the condition to compliance with the securities laws of the United States as interpreted by Eisenberg. Such a harsh result, certainly not intended by the District Court, is a foreseeable consequence of the order appealed from.

There is no attorney-client relationship between Javelin and Eisenberg, or between Eisenberg's selected counsel for Javelin in respect of the Smith action. It is clear under the appointment mandated by Judge MacMahon that the voice of Javelin through the attorney selected by Eisenberg, shall be the voice of the court, of Eisenberg, and of the SEC, but not that of

Javelin. How, then, can a Canadian attorney, retained and controlled by Eisenberg, establish any sort of working relationship with Javelin? Obviously, he cannot. Javelin is therefore placed in the grossly unjust position of attempting to defend the Canadian action without effective aid of counsel.

The SEC's offer to allow Javelin to retain counsel in addition to Eisenberg's nominee is illusory, because the voice of Eisenberg's nominee, appointed with the blessings of the court below at the request of the SEC, would clearly overshadow the voice of Javelin's selected counsel, or at the very least, cast a long shadow upon any conflicting argument made. When two attorneys, both purporting to represent Javelin, differ on points of law or approaches to defense, the practical effect is that the views of each would cancel out the views of the other. The order of the District Court has deprived both Javelin and the court of effective presentation of the case and aid of counsel, and has resulted in serious prejudice to each. Coupled with Eisenberg's conflict of interest, these facts mandated that the court below hold a hearing and make determination of the direction to be taken by the court's appointee, and whether Eisenberg was appropriate as that appointee.

In fairness, Javelin can not in advance criticize Canadian counsel selected or who might be selected by Eisenberg hereafter, and in fairness Javelin cannot claim that such attorneys

will act improperly. It is Javelin's position that it is entitled to be represented by an attorney who will represent its interest exclusively, not those of either Eisenberg or, vicariously, the SEC, U. S. v. TRAFFICANTE, 328 F. 2d 117 (5 Cir. 1964), and that there is no reason why, under the circumstances, the appointment of any counsel, to act on Javelin's behalf was at all necessary, since both Eisenberg and the SEC are parties to the Smith case. If later on a claim was raised by special counsel that he or his attorneys were entitled to reimbursement by Javelin for fees and disbursements incurred in the defense of the Smith action, that matter appropriately should have awaited conclusion of the Smith action, application to Javelin for reimbursement, and then and only then application to the court below or to such other court deemed appropriate for such relief.

CONCLUSION

For the reasons set forth above, the decision of the District Court should be reversed and the order dated December 19, 1975, vacated and set aside.

Respectfully submitted,

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A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

SECURITIES EXCHANGE COMMISSION,

- against -

CANADIAN JAVELIN,

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, Velma N. Howe *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at*
298 Macon Street, Brooklyn, New York 11216
That on the **27th** *day of* **Febrary** *19* **76**, *deponent served the annexed*

Brief *upon* **Securities Exchange Comission** *attorney(s) for*

SEC *in this action, at* **Securities Exchange Comission 500 North Capital Street, Washington ,D.C.** *the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this **27th**
day of **Febrary** *19* **76**.

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418850
Qualified in New York County
Commission Expires March 30, 1977.

Velma N. Howe

VELMA N. HOWE